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No. 91-1513

In The
Supreme Court of the United States
October Term, 1992

UNITED STATES DEPARTMENT
OF THE TREASURY AND
MITCHELL A. LEVINE, ASSISTANT COMMISSIONER,

Petitioners,

v.

GEORGE FABE, SUPERINTENDENT OF
INSURANCE STATE OF OHIO,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

**BRIEF FOR THE NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS;
AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

The federal priority statute, 31 U.S.C. § 3713(a), calls for debts owed to the United States by an insolvent person to be paid first.

Ohio Rev. Code Ann. § 3903.42 provides that claims of the United States are accorded "Class 5" priority, below administrative expenses, employee wages, policyholder claims, and general creditor claims, in state court proceedings to liquidate an insolvent insurer.

Federal preemption nullifies the operation of the Ohio statute, requiring a state court appointed liquidator to pay the claims of the United States ahead of all other creditors, including policyholders, unless the state statute is subject to the anti-preemption provisions of the McCarran-Ferguson Act, 15 U.S.C. § 1012.

The question presented is:

> Whether a state statute establishing the priority of claims in a state court proceeding to liquidate an insolvent insurer is a law regulating "the business of insurance" within the meaning and intent of the McCarran-Ferguson Act.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 939 F.2d 341. The opinion of the district court is unreported.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 154(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3713; 15 U.S.C. §§ 1011, 1012; 11 U.S.C. § 109; and Ohio Rev. Code Ann. (Anderson 1989) §§ 3903.02, 3903.03 and 3903.42 are all reproduced as appendix to this brief.

STATEMENT

On April 30, 1986, the Court of Common Pleas for Franklin County, Ohio declared American Druggists' Insurance Company insolvent and, pursuant to Ohio Rev. Code Ann. § 3903, ordered the company be liquidated. Respondent was appointed to serve as liquidator.

The United States filed various claims with Respondent against American Druggists' based on its capacity as obligee in certain immigration, appearance, performance and payment bonds issued by American Druggists' as surety when it was solvent. The United States also notified Respondent that it asserted a superpriority for payment of its claims pursuant to 31 U.S.C. § 3713(a)(1)(A).

Respondent filed suit in federal district court seeking a declaratory judgment that the United States' priority for its claims was controlled by the applicable Ohio statute governing priorities for claims filed against an insurance company in liquidation, Ohio Rev. Code Ann. § 3903.42, not the federal insolvency statute because the Ohio statute is a state law regulating "the business of insurance" within the meaning and intent of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

The federal district court entered judgment for the United States concluding that the Ohio statute regulated only the business of insurance companies, not "the business of insurance." The district court relied on this Court's three-part test for determining whether an activity is "the business of insurance" within the meaning of the McCarran-Ferguson Act as set out in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982).

Respondent appealed the district court's judgment to the United States Court of Appeals for the Sixth Circuit. That Court reversed the judgment of the district court finding that the applicable Ohio statute is a law regulating "the business of insurance" within the meaning of the McCarran-Ferguson Act, also relying on the three-part test set out in *Pireno*, but looking to two earlier decisions of this Court in applying the *Pireno* test to the state regulation at issue in this case, *Securities & Exchange Commission v. National Securities*, 393 U.S. 453 (1969), and *Group Life & Health Insurance Company v. Royal Drug Company*, 440 U.S. 205 (1979).

The United States filed a petition for writ of certiorari in this Court for a review of the judgment of the Court of Appeals. Such writ was granted on May 18, 1992.

INTEREST OF THE AMICI CURIAE

The parties amici curiae bringing this brief to this Court consist of the National Association of Insurance Commissioners and its members.

The National Association of Insurance Commissioners (the "NAIC") is a non-profit legal association whose members are the chief insurance regulators in each state, territory and the District of Columbia. The NAIC's purpose is to serve the public by assisting these regulatory officials and includes the following fundamental insurance regulatory objectives set out in its constitution:

(1) maintenance and improvement of State regulation of insurance in a responsive and efficient manner;

(2) reliability of the insurance institution as to financial solidity and guarantee against loss; and

(3) the fair, just and equitable treatment of policyholders and claimants.

The NAIC provides services to its members through, among other things, the development and adoption of "model laws." These "model laws" serve as standards for the members of the NAIC in carrying out their responsibilities. The NAIC has adopted the "Insurers Rehabilitation and Liquidation Model Act," NAIC Model Laws, Regulations and Guidelines, 555-1 *et seq.* ("the Model Act") to serve as a guidepost for its members in discharging their statutory and court-ordered duties as rehabilitators and/or liquidators of financially troubled or insolvent insurers. The Model Act provides for uniformity in the approach to rehabilitation and liquidation as well as uniformity in the treatment of the policyholders, claimants and creditors of such insurers. The relevant

Ohio statute, Ohio Rev. Code Ann. § 3903.02 *et seq.*, is similar in its substance to the Model Act, as are most other states' rehabilitation and liquidation laws.

The Model Act expresses as its purposes, among other things, the protection of insureds, claimants, creditors and the public generally through improved efficiency and economy of activities, uniformity among the various states' activities with respect to insurer insolvency, clarification of the law, *regulation of the insurance business* by the impact of the law relating to insurer delinquency procedures and substantive rules on the entire *insurance business* (emphasis added). Model Act, 555-2.

The Model Act contains provisions governing the priority for distribution of the assets of an insolvent insurer. The Ohio statute, which is at issue in this case, is patterned after the Model Act. The Act places claims of the federal government in Class 5 priority (unless such claims qualify for class 3 priority (policyholders)), after administrative expenses, employee wages, policyholder claims and general creditor claims. Model Act, 555-32, 33.

The other participants in this brief are members of the NAIC and have a common interest with the Respondent and the NAIC in the protection *first* of policyholders and claimants under policies of insurance in the unfortunate circumstances of insurer insolvency.

The resolution of the question submitted is of extraordinary importance to state insurance regulatory officials, solvent insurers, policyholders and claimants under policies of insurance, state guaranty associations, state law-making bodies, and the tax paying public in general.

SUMMARY OF ARGUMENT

The enactment of the McCarran-Ferguson Act confirms and ensures the intent of the United States Congress that the traditional policy of state regulation of the business of insurance be maintained and protected. However, the Congress offered no definition for, and legislative history does not clearly illuminate the meaning of the term "the business of insurance" as used in the McCarran-Ferguson Act. *National Securities*, 393 U.S. at 459. An analysis of the applicable state laws relevant federal statutes, and case law, plus an elaboration on the activities and practices of state liquidator lead to the conclusion that federal law does not preempt state law in the instant case.

1. State Regulation

The purpose of the Ohio statute at issue, like the Model Act, is the protection of policyholders. The special elevated priority assigned to policyholders' claims under policies of insurance is inextricably and clearly tied to the relationship between the insolvent insurer and the policyholder. In the absence of the insurer/policyholder relationship, there is no basis for the priority statute application. This is true because the primary purpose of the statute, as well as the Model Act, is the protection of policyholders and claimants under policies of insurance.

In a state-court ordered liquidation of an insolvent insurer, the chief insurance regulatory official of the state is appointed by the state court as the liquidator. Model Act, 555-3. As such, he takes on a new legal capacity, separate and distinct from the role as regulatory official.

It is said that he "steps into the shoes of the insurer." He acts as though he/she were the insurer in dealing with the affairs of the insurer. He becomes the insurer, taking on its identity. The insurer/policyholder relationship is continued and protected by the liquidator. The liquidator is obligated to receive, adjust and pay claims filed by policyholders or claimants under policies as though he were the insurer. The liquidator is bound by the terms of the insurance contract. Such contracts are not automatically canceled upon entry of a court order placing an insurer in liquidation and appointing a liquidator. The relationship that exists between policyholder and insurer does not cease; the only difference is that the management of the insurer is replaced with the liquidator, whose capacity is the same as the insurer. Model Act, 555-14-19.

2. The Supreme Court "trilogy"

a. In *National Securities*, a non-antitrust case, the SEC sought to reverse a merger of two Arizona insurers based upon material misrepresentations to shareholders of one of the companies. The merger was accomplished pursuant to Arizona law. Justice Marshall wrote that the applicable Arizona law regulated the relationship between insurers and their shareholders, not insurers and their policyholders, and thus did not regulate "the business of insurance." *National Securities*, 393 U.S. at 460. He concluded that "the relationship between insurer and insured – the type of policy which could be issued, its reliability, interpretation, and enforcement . . . these were the core of "the business of insurance," and "it is clear where the focus was – it was on the relationship between the insurance company and the policyholder." *Id.* With these words, Justice

Marshall resolved the question of the meaning and intent of Congress in the enactment of McCarran-Ferguson and its use of the term "the business of insurance." "Statutes aimed at protecting this relationship, directly or indirectly, are laws regulating 'the business of insurance'." *Id.*

b. The second case in the trilogy, *Royal Drug,* was an antitrust case involving alleged anticompetitive provider agreements between a Texas insurer and a number of pharmacies. Several nonparticipating pharmacies sued the insurer claiming a violation of the Sherman Antitrust Act. This Court again focused on the relationship between the insurer and the policyholder in its analysis of "the business of insurance." The opinion held that the provider agreements at issue in the case did not serve to spread or underwrite policyholder risk, did not directly involve the relationship between the insurer and the insured, established when the policy is issued, and did not involve only parties within the insurance industry, but rather constituted nothing more than contracts for goods and services between the insurer and the pharmacies. *Royal Drug,* 440 U.S. at 216. The applicable Texas law, which required prior approval of insurance policies, did not regulate these related provider agreements, and the practice was not exempt from the operation of the Sherman Antitrust Act. *Id.* Justice Stewart's opinion elaborated beyond the broader meaning of "the business of insurance" iterated by Justice Marshall in *National Securities* and applied a narrower analysis to the facts of *Royal Drug.*

c. In the last case, *Pireno,* this Court applied the *Royal Drug* test to the relevant facts which involved a peer review process in which the insurer routinely

accepted a state chiropractic association's recommendations for payment to licensed chiropractors as reasonable and necessary treatment for its policyholders. A chiropractor whose patients were not being reimbursed because the association was not recommending payment sued alleging violations of the Sherman Antitrust Act. As in *Royal Drug,* the other antitrust case in the trilogy, this Court used the narrow test to determine whether or not the peer review process constituted "the business of insurance" as intended by the McCarran-Ferguson Act. *Pireno,* 458 U.S. at 129. The Court again, as in *Royal Drug,* concluded that the peer review process was not "the business of insurance." *Id.* at 126.

These three cases form the wellspring from which many lawsuits have emerged. The attempts to reconcile them have been largely unsuccessful primarily because the earliest of the three, *National Securities,* is a non-antitrust case.

3. The Bankruptcy Exclusion

The protection of the insurer/policyholder relationship is the paramount reason that insurance companies are excluded from the operation of federal bankruptcy law. 11 U.S.C. § 109. Congress recognized the need to continue to afford the policyholder special protection in the event of the bankruptcy – insolvency – of his insurance company and provided for that protection by leaving to the states the primary role in regulating "the business of insurance" under the provisions of the McCarran-Ferguson Act.

ARGUMENT

1. The Ohio Statute Is A Law Regulating "The Business Of Insurance" Within The Meaning And Intent Of The McCarran-Ferguson Act.

This case may be summed up in the above single statement. The Ohio statute governing the supervision, rehabilitation and liquidation of an insolvent insurer doing business in Ohio provides the framework for the administration of the "estate" (referring generically to the totality and nature of interest the insurer has in real or personal property) of the insolvent insurer. Its greater purpose is stated as "the protection of the interests of insureds, claimants, creditors, and the public generally . . . " Ohio Rev. Code Ann § 3903.02(D). This purpose is accomplished through a number of activities including the "[E]quitable apportionment of any unavoidable loss . . . ," Ohio Rev. Code Ann. § 3903.02(D)(4), and "[R]egulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business." Ohio Rev. Code Ann. § 3903.02(D)(6).

Generally, state regulation of insurance constitutes regulation of the birth, life and death of an insurer. Comprehensive laws and related regulations provide for the formation of an insurer and authorization for it to begin transaction of the business of insurance within a state's jurisdiction. Throughout the usually long life of an insurer, state regulation continues over the activities of the insurer, including, for example, the issuance of insurance policies and the payment of claims thereunder; the relationship of the insurer with its policyholders, such as

the duty of utmost good faith; the activities an insurer engages in with its parent, subsidiaries and other affiliates; the types of policy and other forms the insurer utilizes; the rates of premiums the insurer charges; the types and nature of assets an insurer may report and take credit for on its financial filings; and the volume of policy reserves an insurer is required to maintain, etc.

In the infrequent case of the termination of an insurer due to insolvency (its death), state regulation again controls the timing of delinquency proceedings, Model Act, 555-3 (a generic reference to a judicial or administrative action initiated by the insurance regulator against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving the insurer; "delinquency" refers to some failure, omission or violation of law or duty) the nature of the delinquency proceedings, the methods and means of disposal of the insurer's assets and liabilities, and provides for funding of expenses and payment of claims. It is in this latter category that the priority for distribution of assets falls. The priority for distribution of assets is an integral part of the regulation of the death of an insurer since it controls which parties are paid and the order of payment. Statutory regulation of delinquency proceedings is a special, comprehensive plan enacted for the specific purpose of regulating the business of the insurance, even though the end result is the death of an insurer and the cessation of the transaction of the business of insurance by the subject insurer. The activity of paying claims pursuant to a priority statute is only one part, albeit an integral one, of the overall plan, the purpose of which ultimately is the protection of

policyholders and policy claimants before other types of creditors.

"The business of insurance," which forms the activities of state regulation of delinquency proceedings, passes the test articulated by Justice Marshall and applied to a non-antitrust set of facts in *National Securities*. That same test applied to the facts of the instant case produces the same result. An analysis of the nature of the activities of a liquidator and the goals of liquidation clearly leads to that result.

A state court-appointed liquidator takes over the insolvent insurer and assumes its management from the officers and directors. Throughout the conduct of the liquidation, the state court acts as the ultimate authority for all activities of the liquidator. The liquidator controls and operates the day to day activities of the insurer, including the ongoing relationships with the insurer's policyholders. The insurance policies become an obligation of the liquidator and do not automatically terminate on liquidation. The liquidator is subject to the agreements made in the policies by the insurer. The insurance company continues to exist and its corporate charter is not revoked. The liquidator performs his duties in different capacity than that of a commissioner or regulator. The liquidator has a fiduciary relationship with the policyholders and must treat them fairly, equitably, and with a high degree of fidelity. To that end, he must promptly determine coverage under policies, adjust claims accordingly, and pay those proper claims utilizing assets of the insurer which have come into his possession. He takes title in his own name to such assets. These activities are inextricably involved in the relationship between the

insurer and the policyholder. State liquidation laws were enacted for the best interests of all creditors, but primarily were intended to protect the policyholder first from the harm attendant to insolvency. The rationale behind this intent is the unique relationship between insurer and policyholder. Generally, Model Act, 555-1-38.

The business of insurance specializes in the acceptance of risk. Certain risks of substantial financial losses or damages are unmanageable or unacceptable to the insurance consuming public. It seeks to transfer those risks, for consideration, to others who are more able to absorb the damages. Those who are in the business of insurance accept these financial risks and develop means of managing them and similar other risks, forming an industry which serves public and social interests. This is not a goods and services industry. At the center of the risk transferring and accepting activity is the ability of those in the business of insurance to pay under the terms of the policy when a claim is filed. The consideration, or the premium, forms the security for more funds to be available for payment to the policyholder in the event a claim is filed. *Managing Insurer Insolvency*, Prepared by Stewart Economics, Inc.; November, 1988; National Association of Insurance Brokers.

Clearly, where a liquidator steps into the shoes of the insurer, the risk accepted by the insurer becomes the risk of the liquidator. The assets available to the liquidator must be marshaled and used to pay claims, after claims are filed and adjusted. Ohio Rev. Code Ann. § 3903.42 transfers the risk of insolvency to the liquidator and spreads it among other policyholders and creditors of the insurer within certain prioritized classes. These activities

are integral to the relationship between the policyholder and the insurer, or the liquidator, and are key elements in the business of insurance. *Fabe v. U.S. Treasury*, 939 F.2d 341, 351 (6th Cir. 1991).

Since state liquidation laws treat policyholders with a special emphasis, they are not considered ordinary creditors by liquidators. The liquidation priority statutes were drafted with policyholders' special needs in mind. Other creditors do not have the same needs. Managing the risk for catastrophic financial damages to a policyholder is the primary focus of the state legislatures in prioritizing policyholders in a class above other creditors of insurers. The intent was to protect the policyholders and protect the unique relationship between policyholder and insurer, or liquidator, where the liquidator is the insurer.

Policyholders and other non-policyholder creditors are included in state insurer liquidation priority designs; however, policyholders occupy an elevated status and must be paid in full if assets are sufficient before non-policyholders creditors' claims are even evaluated and/or paid. If assets are not sufficient, policyholders must be paid proportionately until all assets are exhausted. Policyholders are special claimants and are not categorized with other creditors. The fact that other creditors are provided for in the priority statutes and are eventually dealt with by the liquidator in the process of liquidation does not lessen the special treatment afforded policyholders or alter the special class they occupy. Clearly, based on these factors the priority statute is a law regulating "the business of insurance."

There is support in case law for the proposition that the activities of a liquidator and the liquidation process itself is "the business of insurance." Even though these cases are based on abstention issues and do not address the *Pireno* analysis, they provide persuasive authority for the argument. See, e.g. *Gerald Grimes v. Crown Life Insurance Co.*, 857 F.2d 699 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989); *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980); *Washburn v. Corcoran*, 643 F. Supp. 554 (S.D.N.Y. 1986). One case did recognize the effect of *Pireno* on liquidation proceedings. *United Services Auto Association v. Muir*, 792 F.2d 356 (3d Cir. 1986), cert. denied *sub nom. Grode v. United Services Auto Association*, 479 U.S. 1031 (1987). The court there found that liquidation had a direct bearing upon the relationship between the insurer and the policyholder, using the facts in *Levy* stating, "the state regulation implicated in *Levy* concerned both the future coverage of policyholders and their relationship with a defunct insurer, and so were authorized under McCarran-Ferguson . . . " *Muir*, 792 F.2d at 364.

2. The *National Securities* Broad Test Should Be Applied To The Facts Of The Instant Case.

The distinction between the *National Securities* test and the *Royal Drug/Pireno* test was recognized by at least one jurist in the Second Circuit when *Pireno* was decided at that level. Circuit Judge Kearse wrote that "the phrase 'the business of insurance' may have a broader meaning in those provisions of the McCarran-Ferguson Act that preserve state insurance laws from federal preemption than it does in the antitrust exemption [and] this duality

of meaning [may] explain [] the apparent inconsistency of *Royal Drug*, which interpreted the exemption, with earlier cases that interpreted other exemptions." *Pireno*, 458 U.S. at 394, n. 12.

The difference in meaning between the provisions of the McCarran-Ferguson Act which preserve state regulation and those which exempt activities from federal antitrust laws is at the heart of the instant case. The enactment of the McCarran-Ferguson Act served as a compromise between the position on the one hand that insurance was interstate commerce subject to federal regulation (*U.S. v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944)) and the concerns that the federal government would not take effective action to regulate the "business of insurance" as interstate commerce. The NAIC developed, drafted and proposed the bill which ultimately was passed into law. That legislation sought to preserve and maintain continued state regulation of the business of insurance but retain the application of federal antitrust laws. 1944 Proceedings of the NAIC, 54-55, and 1945 Proceedings of the NAIC, 23-49.

The legislative intent behind the McCarran-Ferguson Act and the trilogy of cases out of this Court interpreting "the business of insurance," properly applied to the facts of the instant case, lead to the inevitable result that the federal superiority statute is not controlling over the liquidation of insolvent insurers by the states or the state priority statutes for distribution of an insolvent insurer's assets in a liquidation.

In *Royal Drug*, the Court recognized that the enactment of the McCarran-Ferguson Act served two purposes

intended by Congress: first to ensure that the States continue to tax and regulate the business of insurance, and second, to provide a limited antitrust exemption to insurance companies. *Royal Drug*, 440 U.S. at 217-218. The two purposes are expressed at 15 U.S.C. § 1011 and § 1012(a) and (b).

There are two separate and distinct sections of the McCarran-Ferguson Act applicable to these two purposes. The term "the business of insurance" appears in both sections. Given the dual purposes of the Act, the term has been interpreted differently. The first purpose guarantees States the right to regulate "the business of insurance" generally and to enact state laws for that purpose free from preemption by any general federal law in conflict. The second purpose ensures that insurance companies, even though regulated by the States, would not escape federal antitrust regulation completely.

Given the dual purposes of the Act, the Court has defined "the business of insurance" different ways in two different areas: the non-antitrust and the antitrust.

The general intent of the McCarran-Ferguson Act, as well as the plain language in the absence of the antitrust, is implicated in the broad definition articulated by the Court in *National Securities*. In the context of what is called the "antitrust proviso" of McCarran-Ferguson, the Court has developed a three-pronged test to determine whether the challenged activities are "the business of insurance." *Royal Drug*, 440 U.S. at 214-215; *Pireno*, 458 U.S. at 129. These two different definitions and tests are entirely appropriate given the distinctions made in McCarran-Ferguson itself.

The notion that "the business of insurance" has a broad definition in the context of a non-antitrust case is not new. Writers have suggested that application of the narrow *Royal Drug/Pireno* definition in cases which do not come within the purview of the "antitrust proviso" is an inappropriate limitation. Application of the traditional rule of consistency in statutory construction would subvert legislative intent and has brought about catastrophic results for states and policyholders, who will find their entitlements to their insurer's assets stripped away by a federal bureaucracy. See Davis Howard, *Uncle Sam Versus The Insurance Commissioners: A Multi-Level Approach to Defining the "Business of Insurance" Under The McCarran-Ferguson Act*, 25 Willamette Law Review 1, 79 (1989).

Courts have also referred approvingly to this "multi-definitional analysis." *Lyons v. United States*, No. 4-91-10209, slip op. at 7 n.3 (S.D. Iowa July 2, 1992). See also *State of Idaho ex rel. Soward v. United States*, 858 F.2d 445 (9th Cir. 1988), cert. denied *sub nom. Fagiano v. U.S.*, 490 U.S. 1065 (1989) at 453. Even the Second Circuit in its *Pireno* ruling agreed that different definitions of the term "the business of insurance" is appropriate, given different challenged activities. *Pireno*, 458 U.S. at 394, n.12.

3. The Federal Bankruptcy Exclusion Illustrates Congressional Intent Of McCarran-Ferguson To Protect Policyholders First.

An insurance company cannot initiate a voluntary bankruptcy proceeding. 11 U.S.C. § 109(b)(2) and (d). Nor can creditors of an insurance company, whether of the policyholder category or otherwise, initiate involuntary

bankruptcy proceedings against an insurance company. If the initiation of delinquency proceedings against an insurer by a state regulatory official resulted in a conversion of the insurer to an ordinary corporation/debtor subject to federal bankruptcy laws then the federal priority statute would still be inapplicable. 31 U.S.C. § 3713(b). Policyholders do not lose their special entitlements as a special class of creditors and are not converted into ordinary creditors to be dealt with at the same time as all other non-policyholder creditors. Policyholder protection and the preservation of state regulation over the entire state liquidation procedure were the goals when Congress exempted insurers from the application of federal bankruptcy laws. If the federal priority statute were held to apply to insurers, then delinquency proceedings against an insurer would, have less meaning than an ordinary corporate bankruptcy. Policyholders of an insolvent insurer would have less protection than ordinary creditors of a corporation in bankruptcy. States would be rendered incapable of providing the special protection needed by policyholders to minimize financial loss and to realize the benefits of their bargain when they purchased insurance coverage. *Davis v. Pringle*, 1 F.2d 860 (4th Cir. 1924), aff'd, 268 U.S. 315 (1925), 864 and *Sims v. Fidelity Assurance Association*, 129 F.2d 442 (4th Cir. 1942) aff'd on other grounds, 318 U.S. 608 (1943), 448-449. Certainly these unseemly results were not contemplated or intended by Congress. The opposite, in fact, is true: Congress intended that states would step in and enact laws and regulations to provide special protection and treatment for policyholders.

CONCLUSION

As the foregoing discussion demonstrates, the findings of the Sixth Circuit were entirely correct, guided by an unstrained application of the plain language of the statutes involved, and by the sound public policy concerns which led to the enactment of those statutes. To do other than affirm the Sixth Circuit's opinion would lead to a result unintended by lawmakers – that is the complete subjugation of the entitlements and rights of policyholders to a federal government seeking to improve its revenue position and expand its authority into an area reserved traditionally and wisely to state control. Once again, the burden of government funding falls heavily on the backs of innocent consumers. The entire state insurance regulatory system would be crippled. Congress has expressed a contrary intent throughout its history. The Ohio Commissioner is seeking to do exactly as Congress intended – regulate the business of insurance and protect policyholders.

The opinion of the Sixth Circuit Court of Appeals should be affirmed.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The general federal priority statute, 31 U.S.C. § 3713, provides:

Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when –

(A) a person indebted to the Government is insolvent and –

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

2. The McCarran-Ferguson Act, 15 U.S.C. § 1011-12, provides:

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

3. The federal bankruptcy statute, 11 U.S.C § 109, provides:

§ 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not –

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. § 1813(h)); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity –

(1) is a municipality;

(2) is generally authorized to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

(f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a

debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if –

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

4. The Ohio Insurers Supervision, Rehabilitation, and Liquidation Act, Ohio Rev. Code Ann. 3903.02, 3903.03 and 3903.42 provide:

§ 3903.02. "Insurers Supervision, Rehabilitation, and Liquidation Act"

(A) Section 3903.01 to 3903.59 of the Revised Code may be cited as "the insurers supervision, rehabilitation, and liquidation act."

(B) Sections 3903.01 to 3903.59 of the Revised Code do not limit the powers granted the superintendent of insurance under any other section of the Revised Code.

(C) Sections 3903.01 to 3903.59 of the Revised Code shall be liberally construed to effect the purpose stated in division (D) of this section.

(D) The purpose of sections 3903.01 to 3903.59 of the Revised Code is the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers, through all of the following:

(1) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures;

(2) Improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry;

(3) Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation;

(4) Equitable apportionment of any unavoidable loss;

(5) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this state;

(6) Regulation of the insurance business by the impact of the law relating to the delinquency procedures and substantive rules on the entire insurance business.

§ 3903.03. Applicability of proceedings

The proceedings authorized by sections 3903.01 to 3903.59 of the Revised Code may be applied to any one or more of the following:

(A) All insurers who are doing, or have done, an insurance business in this state, and against whom claims arising from that business may exist now or in the future;

(B) All insurers who purport to do an insurance business in this state;

(C) All insurers who have insureds resident in this state;

(D) All other persons organized or in the process of organizing with the intent to do an insurance business in this state;

(E) All other companies, associations, societies, or entities subject to regulation by the superintendent of insurance under Titles XVII and XXXIX of the Revised Code.

§ 3903.42. Priority of claims distribution

The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class. The order of distribution of claims shall be:

(A) Class 1. The costs and expenses of administration, including but not limited to the following:

   (1) The actual and necessary costs of preserving or recovering the assets of the insurer;

   (2) Compensation for all services rendered in the liquidation;

   (3) Any necessary filing fees;

   (4) The fees and mileage payable to witnesses;

   (5) Reasonable attorney's fees;

   (6) The reasonable expenses of a guaranty association or foreign guaranty association in handling claims.

(B) Class 2. Debts due to employees for services performed to the extent that they do not exceed

one thousand dollars and represent payment for services performed within one year before the filing of the complaint for liquidation. Officers and directors shall not be entitled to the benefit of this priority. Such priority shall be in lieu of any other similar priority that may be authorized by law as to wages or compensation of employees.

(C) Class 3. All claims under policies for losses incurred, including third party claims, all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property that are not under policies, and all claims of a guaranty association or foreign guaranty association. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values, shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment by an employer to an employee shall be treated as a gratuity. Claims under nonassessable policies for unearned premium or other premium refunds.

(D) Class 4. Claims of general creditors.

(E) Class 5. Claims of the federal or any state or local government. Claims, including those of any governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs

occasioned thereby. The remainder of such claims shall be postponed to the class of claims under division (H) of this section.

(F) Class 6. Claims filed late or any other claims other than claims under divisions (G) and (H) of this section.

(G) Class 7. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance companies shall be limited in accordance with law.

(H) Class 8. The claims of shareholders or other owners.